CEBS/2008/214
CEIOPS-3L3-19/08
CESR/08-543b

Guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector required by Directive 2007/44/EC

Table of contents

Introduction

I. BACKGROUND

1. The present Guidelines should be read with Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 [1] ('the Directive') as background. This Directive amends the European prudential Directives applicable to credit institutions, investment firms, and insurance and reinsurance undertakings (hereafter referred to collectively as 'financial institutions') by introducing identical procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector [2].

2. The main objectives of the Directive are to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof by :

   i. harmonising the conditions under which the proposed acquirer of a holding in a financial institution is required to provide notification of its decision to the competent authority responsible for the prudential supervision of the target financial institution;

   ii. defining a clear and transparent procedure for the prudential assessment of the proposed acquisition by the competent authorities, including setting the maximum period of time for completing the process;

   iii. specifying clear criteria of a strictly prudential nature to be applied by the competent authorities in the assessment process; and

   iv. ensuring that the proposed acquirer knows what information it will be required to provide to the competent authorities in order to allow them to assess the proposed acquisition in a complete and timely manner.

3. Due to the increasing integration of financial markets and the frequent use of group structures that extend across multiple Member States, a single acquisition of a qualifying holding may be subject to scrutiny in several Member States. This has led to the adoption of a Directive based on the principle of maximum harmonisation of the procedural rules and assessment criteria throughout the European Community, without the

1 Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector ('the amending Directive') (OJ L 247, 21.9.2007, p.1).

2 The Directives affected by these amendments are: Directive 92/49/EEC (Non-life insurance), Directive 2002/83/EC (Life assurance), Directive 2004/39/EC (Markets in Financial Instruments Directive - MiFID), Directive 2005/68/EC (Reinsurance), and Directive 2006/48/EC (Credit institutions - Capital Requirements).

Member States being able to lay down stricter rules. Moreover, identical provisions now apply in all three financial sectors.

4. Achieving the goals of the Directive requires that supervisory authorities throughout the Community and in all three sectors cooperate closely, both in the exchange of information and in the consideration of prudential issues or concerns about the financial institutions they supervise, and that they promote convergence in their supervisory practices, within the new common legal framework for the prudential assessment of acquisitions.

5. The three Level-3 Committees of European Financial Supervisors (CEBS, CESR, and CEIOPS) have therefore agreed to work together:

   i. to reach a **common understanding on the five assessment criteria** laid down by the Directive, as a prerequisite for convergent supervisory practices;

   ii. to define appropriate **cooperation arrangements** ensuring an adequate and timely flow of information between supervisors, taking into account the limited time provided under the Directive for completing prudential assessments; and

   iii. to establish an **exhaustive and harmonised list of information** that proposed acquirers should include in their notifications to the competent supervisory authorities.

II. GENERAL PRINCIPLES

A. Assessment procedures

a. *TIME LIMITS FOR NOTIFICATION AND TRANSMISSION OF INFORMATION BY THE PROPOSED ACQUIRER AND FOR PRUDENTIAL ASSESSMENT BY THE COMPETENT AUTHORITY*

6. One of the objectives of the Directive is to construct the prudential assessment process for an acquisition or an increase in qualifying holdings:

   i. The proposed acquirer is required to provide advance notification of its decision to the supervisor of the target institution. This notification must be accompanied by all of the required information allowing the competent authority to conduct its prudential assessment of the proposed acquisition.

   ii. Within two working days following receipt of the notification and of all the required information, the competent authority is required to acknowledge in writing its receipt of the notification and information, specifying the date of expiry of the assessment period.

   iii. The assessment period is normally limited to a maximum of 60 working days following the acknowledgement of receipt by the competent authority.

   iv. When the information transmitted by the proposed acquirer, although nominally complete, appears insufficient to permit the prudential

assessment, the competent authorities may request in writing, no later than on the 50th working day of the assessment period, any additional information that they may specify. The assessment period is then interrupted until the additional information has been received. This interruption generally may not exceed 20 working days [3].

v. The decision of the competent authorities to oppose an acquisition must be communicated to the proposed acquirer in writing within two working days of reaching that decision. If the competent authorities do not oppose the proposed acquisition before the end of the assessment period, the acquisition shall be deemed to be approved.

7. To avoid undue delays in the assessment process, it is essential that the acquirer promptly transmits all required information, along with the notification of its decision, to the competent supervisory authority; the assessment period will not start until the transmission of all required information is completed. For this reason, the list of information necessary to carry out the assessment (in Appendix II of these Guidelines) – which the Directive requires Member States to make publicly available – shall be considered an exhaustive list of required information.

8. In some cases, the target supervisor may not need the acquirer to provide all of the information that appears on the published list: for example, if the supervisor already possesses some information or can obtain it from another supervisory authority. In such cases, the target supervisor should expressly exempt the acquirer from providing certain pieces of information.

9. In other cases, the target supervisor may consider, on the basis of its analysis of the nominally complete information transmitted by the acquirer, that some additional information is necessary for the assessment of the acquisition. In these cases, the supervisor may request in writing that the proposed acquirer provides the additional information. The supervisor is encouraged to transmit such a request for supplementary information as soon as possible during the assessment process. The request will trigger the beginning of the interruption period mentioned above. By definition, this additional information is not included as such on the list of required information, but clarifies and completes the information submitted in accordance with that list.

10. When possible, target supervisors are encouraged to inform the proposed acquirer of the absence of objections against a proposed acquisition as soon as possible after they made their decision and in any case before the end of the assessment period. In the event that some pieces of information are false or forged, rendering the conclusions of the competent supervisor liable to be erroneous, the competent supervisor must refuse to approve the acquisition.

3 If the acquirer is situated or regulated outside the EEA, or if it is not subject to supervision in the EEA, the interruption may be extended to 30 working days.

b. *NOTIFICATION REQUIREMENT*

11. Under the Directive, a proposed acquirer is required to provide notification of a proposed acquisition to the target supervisor as soon as it has made the decision to acquire, increase, or reduce a qualifying holding in the target financial institution.

12. Notification is also required if the acquirer involuntarily crosses a threshold, or when persons are acting in concert [4], or in the case of a decrease in an existing shareholding [5].

13. If significant shareholdings are held indirectly through one or more third parties, all persons in the chain of holdings should be assessed against the five assessment criteria where a threshold is crossed. These requirements may be satisfied by assessing the person at the top of the chain and those who hold shares in the target financial institution directly, unless the target supervisor has doubts about intermediate holders.

c. *COMPETENT SUPERVISORY AUTHORITY ('TARGET SUPERVISOR')*

14. As stated in the 10th recital of the Directive, "the responsibility for the final decision regarding the prudential assessment remains with the competent authority responsible for the supervision of the entity in which the acquisition is proposed" (the 'target supervisor'). Nevertheless, if the acquirer is a financial institution supervised in the EEA by another supervisory authority (the 'acquirer supervisor'), the target supervisor should take fully into account the opinion of the acquirer supervisor, particularly as regards the assessment criteria directly related to the proposed acquirer. Where appropriate, such cooperation among supervisors could be organized by having recourse to existing supervisory colleges or to such colleges that may be created in the future in accordance with new prudential Directives.

15. On the other hand, if the target institution directly concerned by the proposed acquisition in turn directly or indirectly controls subsidiaries that are financial institutions subject to the supervision of other EEA competent authorities, each of these subsidiaries shall also be considered indirectly as 'target financial institutions'. Consequently, the competent authorities responsible for the prudential supervision of those subsidiaries shall also be identified as 'target supervisors' and the acquirer is required to provide notification of its proposed acquisition to each of these authorities. In such cases – by analogy with what is stated in the 10th recital of the Directive – while the responsibility for the final decision regarding the prudential assessment remains with each of the competent authorities as regards the institution which it supervises, these supervisory authorities should cooperate closely among themselves and take each other's opinions fully into account.

4 "involuntarily crossing a threshold" and "acting in concert" are defined in the Glossary

5 In cases of decreaseof participation, there will be no assessment of the shareholder that decreases its stake, but possibly of the proposed acquirer of the shares that are sold.

d. *PRELIMINARY CONTACTS BY THE PROPOSED ACQUIRER WITH THE TARGET SUPERVISOR*

16. The 7th recital of the Directive states that: "Regular contact between the proposed acquirer and the competent authority of the regulated entity in which the acquisition is proposed may also commence in anticipation of a formal notification. Such cooperation should imply a genuine effort to assist each other in order, for example, to avoid unanticipated requests for information or the submission of information late in the assessment period."

17. Such preliminary contacts with the target supervisor may be particularly useful when the proposed transaction presents some complexity for both the acquirer and the target supervisor (linked, for instance, to the transaction itself, to the complex group structure of the acquirer, to the structure of the target financial institution, etc.).

B. Proportionality principle

18. The Directive applies the principle of proportionality to the assessments. This principle, which is mentioned in recitals 5, 8, and 9, applies both to the composition of the required information and to the assessment procedures. The type of information required from the acquirer may be influenced by the particularities of the acquirer (legal vs. natural person, supervised financial institution vs. other entity, whether or not the financial institution is supervised in the EEA or an equivalent third country, etc.), the particularities of the proposed transaction (intra-group vs. “external” transaction etc.), the degree of involvement of the acquirer in the management of the target financial institution, or the level of the holding to be acquired.

19. For instance, the proportionality principle implies that in the case of intra-group transactions within the group of an existing shareholder without any real or substantial change in the direct or ultimate shareholding of the financial institution, adequate information should be provided to the target supervisor. On the other hand, the shareholder's group should not be re-assessed since the transaction does not affect the influence it exercises over the financial institution.

20. The proportionality principle also applies in the following manner when the proposed acquirer is an asset manager who manages the shareholdings of his clients (UCITS or private portfolio owners):

- usually, notification and prudential assessment will not be required since :
  - existing rules prevent each UCITS individually or the asset manager acting for the account of the common funds he manages from exercising a significant influence on the issuers (see Art. 25 of the UCITS Directive);
  - asset managers are only required to aggregate the voting rights they exercise in the name of their clients when they are free to

decide on their own the way to exercise these voting rights, i.e. when they have not received specific mandates from each client specifying the way to exercise his voting rights;

- even when they are free to determine on their own the way to exercise voting rights belonging to their clients, the objectives pursued in the framework of asset management activity and a sound diversification of portfolios will usually ensure asset managers from crossing the thresholds for notification or gaining control of an issuer;

- if they are nevertheless required to notify the crossing of a threshold :
  - the extent of the required information (see in particular part II of the information list in the annex) may be tailored to the level of the holding to be acquired and the involvement in the management of the target financial institution;
  - if the asset manager is regulated and supervised within the EEA or in an equivalent third country, the target supervisor may exempt him from providing some information according to the procedures described in footnote 17.

21. Under some circumstances, such as in the case of acquisitions by means of a public offer, the acquirer may encounter difficulties in obtaining information which is needed to establish a full business plan. In these cases, the acquirer shall bring these difficulties to the attention of the target authority and point out the aspects of its business plan that may be modified in the near term (see also footnote 26). On the other hand, in such circumstances, the proportionality principle will be applied in the sense that the proposed acquisition should not be refused on the sole basis of the lack of some required information that can be justified by the nature of the transaction, provided that the partial information appears sufficient to understand the probable outcome of the acquisition for the target financial institution and that the proposed acquirer commits himself to providing the missing information as soon as possible after the closing of the acquisition.

C. Prudential assessment of acquisitions vs. on-going prudential supervision

22. The Directive focuses on the prudential assessment of a proposed acquirer only at the time of an acquisition or an increase in a qualifying holding in a financial institution. The Directive does not alter or reduce the competence of the supervisory authority to supervise the fitness and propriety of the existing qualified shareholders of supervised financial institutions on an ongoing basis, and to exercise their legal powers when an existing shareholder appears no longer to possess the required qualities.

First assessment criterion

Reputation of the proposed acquirer

I. DEFINITION AND SCOPE

23. Recital 8 of the Directive addresses the reputation of the acquirer:

> "With regard to the prudential assessment, the criterion concerning the 'reputation of the proposed acquirer' implies the determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether these doubts are founded. Such doubts may arise, for instance, from past business conduct. The assessment of the reputation is of particular relevance if the proposed acquirer is an unregulated entity but should be facilitated if the acquirer is authorised and supervised within the European Union".

24. Thus the assessment of the reputation of the proposed acquirer covers two elements:
- his integrity, and
- his professional competence.

II. INTEGRITY

a/ Situations subject to assessment

25. In general, the acquirer is assumed to be of 'good repute' (trustworthy) if there is no evidence to the contrary.

26. Integrity requirements imply the absence of 'negative records'. This notion is further specified in national laws or regulations, although these laws differ on the meaning of negative records, recognising that the target supervisor retains discretionary power to determine which other situations cast doubt on the trustworthiness of the acquirer.

27. Supervisors should pay particular attention to the following situations, which may cast doubt on the integrity of the acquirer:
- Conviction of a relevant criminal offence. Special consideration should be given to any offence under the laws governing banking, financial, securities or insurance activity, or concerning securities markets or securities or payment instruments, including laws on money laundering, market manipulation, or insider dealing and usury; to any offences of dishonesty, fraud, or financial crime; and to other offences under legislation relating to companies, bankruptcy, insolvency, or consumer protection [6].

6 Article 3, paragraph 5 of the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing contains a definition of *"serious crimes"* which includes, among others, *"all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold in their legal systems, for a minimum of more than six months"*.

- Any relevant criminal offences currently being tried or having been tried in the past may also be relevant, as they can cast doubt on the integrity of the acquirer and may mean that the integrity requirements are not met.

28. The integrity of the proposed acquirer is not only affected by court decisions and ongoing judicial proceedings. The following situations should be taken into account as well, since they may cast doubt on the integrity of the acquirer:
    - current or past investigations and/or enforcement actions related to the acquirer, or the imposition of administrative sanctions for non-compliance with provisions governing banking, financial, securities or insurance activity, or those concerning securities markets, securities or payment instruments, or any financial services legislation, or
    - current or past investigations and/or enforcement actions by any other regulatory or professional bodies for non-compliance with any relevant provisions.

29. In addition to considering judicial or administrative decisions or procedures, the assessment of the integrity of the proposed acquirer should examine its correctness in past business dealings, the lack of which may undermine the integrity and trustworthiness of the proposed acquirer at the time of the acquisition. Supervisors should pay attention to:
    - any evidence that the acquirer has not been transparent, open, and cooperative in its dealings with supervisory or regulatory authorities, including any evidence that it knowingly ignored its notification obligation according to the Directive or attempted to escape from the prudential assessment it had to undergo as a proposed qualifying shareholder ;
    - refusal of a registration, authorisation, membership, or licence to carry out a trade, business, or profession; or revocation, withdrawal, or termination of such registration, authorisation, membership, or licence; or expulsion by a regulatory or government body;
    - dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position; and
    - disqualification from acting as a person who directs the business.

30. Target supervisors should assess the relevance of such situations on a case-by-case basis, recognising that the characteristics of each situation may be more or less severe and that some situations may be significant when considered together, even though each of them in isolation may not be significant.

31. Target supervisors may judge, the relevance of criminal records differently according to the type of conviction, the level of appeal (definitive vs. non-definitive convictions), the type of punishment

(imprisonment vs. less severe punishments), the length of the sentence (more vs. less than a specified period), the phase of the judicial process reached (conviction, trial, indictment) and the effect of rehabilitation.

32. In cases involving the acquisition of a new qualifying holding, the information requirements on which the assessment of integrity is based may vary according to the nature of the acquirer (natural vs. legal person, regulated or supervised entity vs. unregulated entity).

33. But in all cases, the acquirer itself should attest in a statement that none of the situations described in points 24 to 26 is occurring or has occurred in the past to the best of its knowledge. A delayed, incomplete, or undelivered declaration will call into question the approval of the acquisition.

34. And in all cases, the supervisory authority should be able to verify the statement submitted by the proposed acquirer by asking it to provide documents evidencing that the statement is true (e.g., recent extracts from the criminal register), and, if needed, by requesting confirmation from other authorities (judicial authorities or other regulators), domestic or foreign.

35. In the case of an increase in an existing qualifying holding, and to the extent that the integrity of the acquirer has previously been assessed by the supervisor, the relevant information should be updated as appropriate.

b/ Persons subject to assessment

36. If the shareholder is a company or an institution, the integrity requirements must be satisfied by the legal person as well as by all of the persons who effectively direct the business [7], subject to national legislation.

37. When assessing the integrity of the acquirer, the supervisory authority may take into consideration any person linked to the acquirer: i.e., any person who has, or appears to have, a relevant family or business relationship with the acquirer [8].

c/ Application of the proportionality principle

38. The integrity requirements should be applied regardless of the level of the qualifying shareholding that a proposed acquirer intends to acquire, and of its involvement in the management or the influence that it is planning to exercise on the target institution.

---

7 *"Persons who effectively direct the business"* is the expression employed in Article 11 of Directive 2006/48/CE.. The use of such terms as *"board of directors"* and *"chief executive officers"* varies significantly across the Member States, depending on company law and corporate governance rules.

8 To give a few examples (where A is the acquirer and B is a connected person): a relevant business relationship could be where A is the controlling shareholder of a company and B is a board member of that company appointed by A, or vice versa; A and B jointly control a company; A and B are board members of a company appointed by the same shareholder; A and B participate in a shareholder agreement regarding the exercise of voting rights which have significant influence in a company, etc.

III. PROFESSIONAL COMPETENCE

39. The professional competence of the proposed acquirer covers competence in management (‘management competence’) and in the area of the financial activities carried out by the target institution ('technical competence').

40. The **management competence** may be based on the acquirer’s previous experience in acquiring and managing holdings in companies, and should demonstrate due skill, care, diligence, and compliance with the relevant standards.

41. The **technical competence** may be based on the acquirer’s previous experience in operating and managing financial firms as a controlling shareholder or as a person who effectively directs the business of a financial firm. In this case also, the experience should demonstrate due skill, care, diligence, and compliance with the relevant standards.

42. In the case of an increase in an existing qualifying holding, and to the extent that the professional competence of the acquirer has been assessed previously by the supervisor, the relevant information should be updated as appropriate. Under the ‘proportionality principle’, this updated assessment of the professional competence of the acquirer should take into account the increased influence and responsibility associated with the increased holding.

a/ Persons subject to assessment

43. If the acquirer is a legal person, the assessment of professional competence should cover both the company itself and the persons who effectively direct the business. The assessment of technical competence should relate primarily to the financial activities currently performed by the acquirer and/or by companies in the group to which it belongs.

b/ Application of the proportionality principle

44. The assessment of professional competence should take into account the influence that the acquirer will exercise over the target institution. That is, competence requirements are reduced for acquirers who are not in a position to exercise, or do not intend to exercise any influence over the target institution [9]. In such circumstances, evidence of adequate management competence should be sufficient.

45. Natural or legal persons may acquire significant holdings in financial companies with the aim of diversifying their portfolio and/or obtaining dividends or capital gains, rather than with the aim of becoming involved in the management of the financial institution concerned. According to the proportionality principle, the professional competence requirements for this type of acquirer could be significantly reduced.

9 For instance, a minority shareholder or a shareholder who expresses his willingness not to be involved in the management of the target financial institution.

46. Similarly, when the acquisition of control or of a shareholding allows the acquirer to exercise a strong influence (e.g., a holding which confers a veto power), the need for technical competence will be greater, considering that the controlling shareholders will define and/or approve the business plan and strategies of the financial institution concerned. In the same way, the degree of technical competence needed will depend on the nature and complexity of the activities envisaged.

IV. PRACTICALITIES OF THE COOPERATION PROCESS

a/ Integrity requirements

i. Acquirer supervised by the same competent supervisor, or by another competent supervisor in the same country or in another Member State

47. The integrity requirements should generally be presumed to have been met if:

- the acquirer is a natural or legal person already considered to be '*of good repute'* in its capacity as a significant shareholder of another financial institution which is supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State;
- the acquirer is a natural person who already directs the business of the same or another financial institution which is supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State; or
- the acquirer is a legal person regulated and supervised as a financial institution by the same competent supervisor or by another competent supervisor in the same country or in another Member State.

ii. Acquirer supervised by a competent supervisor in a third country

48. The assessment of integrity may be based on an assessment of the substantial equivalence of the regulation concerning integrity requirements in a third country (i.e., a country outside the European Economic Area), and the assessment may be facilitated by cooperating with the competent supervisory authority in the third country, if:

- the acquirer is a natural or legal person already considered to be '*of good repute'* in his capacity as a significant shareholder of another financial institution which is supervised by a competent supervisor in the third country;
- the acquirer is a natural person who already directs the business of the same or another financial institution which is supervised by a competent supervisor in the third country; or
- the acquirer is a legal person regulated and supervised as a financial institution by a competent supervisor in the third country.

b/ Professional competence

i. Acquirer supervised by the same competent supervisor, or by another competent supervisor in the same country or in another Member State

49. The professional competence requirement should generally [10] be presumed to have been met:

- if the acquirer is a natural or a legal person already considered to be 'of good repute' in his capacity as a significant shareholder of another financial institution supervised by the same competent supervisor or supervised by another competent supervisor in the same country or in another Member State;
- if the acquirer is a natural person who already directs the business of the same or another financial institution supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State; or
- if the acquirer is a legal person regulated and supervised as a financial institution by the same competent supervisor or by another competent supervisor in the same country or in another Member State.

ii. Acquirer supervised by a competent supervisor in a third country

50. The assessment of professional competence may be based on an assessment of the substantial equivalence of the regulation concerning professional competence requirements in the third country, and the assessment may be facilitated by cooperating with the competent supervisory authority in the third country, if:

- the acquirer is a natural or legal person already considered to be 'of good repute' in his capacity as significant shareholder of another financial institution supervised by a competent supervisor in a third country;
- the acquirer is a natural person who already directs the business of the same or another financial institution supervised by a competent supervisor in a third country; or
- the acquirer is a legal person regulated and supervised as a financial institution by a competent supervisor in a third country.

10 The word "*generally*" in this sentence reflects the fact that, just because an acquirer has been judged competent to control (for example) a small firm providing financial advice, it does not necessarily mean that it is competent to control a more significant firm such as a large bank. Moreover, the relevance of the previous assessment by the other supervisor must be considered in the light of any new or revised evidence that could cast doubt on the acquirer's competence.

2nd assessment criterion

Reputation and experience of those who will direct the business

DEFINITION AND SCOPE

51. This criterion is formulated in the Directive as follows:

"the reputation and experience of any person who will direct the business of the [financial institution] as a result of the proposed acquisition".

52. This criterion comes into play when the proposed acquirer:

- is in a position to appoint new persons who will direct the business of the financial institution, and
- has already identified these new persons who will direct the business that it intends to appoint.

53. In contrast – and without prejudice to the on-going fit and proper requirements that apply to persons who currently direct the business under existing Directives – the second assessment criterion does not apply to a proposed acquisition that does not involve the appointment of new persons who will direct the business.

54. If the acquirer intends to appoint a person who is not fit and proper, then the target supervisor should oppose the proposed acquisition.

55. This criterion shall be implemented in relation to the relevant provisions of the sectoral Directives [11], which make it a condition in all circumstances for granting authorisation that the persons who will direct the business be 'fit and proper'[12].

11 Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC.

12 The 3L3 Committees plan to conduct a survey of the domestic provisions implementing "fit and proper" requirements for individuals in banks, insurance companies, and investment firms as set out in the sectoral Directives, as a first step towards promoting a common and more general understanding of fit and proper requirements, covering both situations linked to an acquisition and any other situations involving the entities concerned.

3rd assessment criterion

Financial soundness of the proposed acquirer

DEFINITION AND SCOPE

56. This criterion is formulated in the Directive as follows:

"The financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the [financial institution] in which the acquisition is proposed".

Two aspects of the definition need to be clarified.

57. First, *"the financial soundness of the proposed acquirer"* can be understood as the capacity of the acquirer to finance the proposed acquisition and to maintain a sound financial structure for the foreseeable future. This capacity should be reflected in the overall aim of the acquisition and the policy of the acquirer regarding the acquisition, but also – in the case of a change in control - in the forecast financial objectives, consistent with the strategy identified in the business plan.

58. Thus this assessment criterion allows supervisory authorities to determine whether the financial soundness of the proposed acquirer is strong enough to ensure the sound and prudent management of the target financial institution for the foreseeable future (usually three years) in accordance with the principle of proportionality (nature of the acquirer, nature of the acquisition).

59. Second, in the case of a change in control, the phrase "*in particular in relation to the type of business pursued and envisaged in the [financial institution]*" should take into account the scope of criterion 4 (compliance with prudential requirements). While the objective of criterion 3 is to assess the financial soundness of the proposed acquirer, the objective of criterion 4 is to assess the prospective soundness of the target financial institution, which presupposes the financial soundness of the acquirer (i.e., its capacity to implement the business plan). Thus criteria 3 and 4 should be considered as linked, and can be analysed together.

60. The target supervisor should oppose the acquisition if it concludes, based on its analysis of the information received, that the acquirer is likely to face financial difficulties during the acquisition process or in the foreseeable future.

61. The target supervisor should also analyse whether the financial mechanisms put in place by the proposed acquirer to finance the acquisition, or existing financial relationships between the acquirer and the target financial institution, could give rise to conflicts of interest that could destabilise the financial structure of the target financial institution.

APPLICATION OF THE PROPORTIONALITY PRINCIPLE

62. In accordance with the principle of proportionality, the depth of the assessment of the financial soundness of the acquirer should be linked with and proportionate to the nature of the acquirer and the nature of the acquisition. In this regard, one should distinguish situations where the acquisition leads to a change in the control of the target financial institution from situations where it does not. Even in the latter cases, the assessment of the financial soundness of the acquirer should take into consideration the involvement of the proposed acquirer in the management of the target financial institution.

63. The assessment of financial soundness will not always be carried out in the same way. The characteristics of the proposed acquirer may justify differences in the depth and methods of the analysis by the competent supervisor.

64. The information required for the assessment of the financial soundness of the proposed acquirer will depend on the legal status of the proposed acquirer: for example, whether it is:
- a financial institution subject to prudential supervision,
- a legal entity other than a financial institution, or
- a natural person.

65. If the proposed acquirer is a financial institution subject to prudential supervision by another (EEA or equivalent) competent supervisor, the target supervisor should take into account the assessment of the proposed acquirer's financial situation by the acquirer supervisor, together with the documents gathered and transmitted directly by the acquirer supervisor to the target supervisor.

PRACTICALITIES OF THE COOPERATION PROCESS

66. The cooperation process will be influenced by the nature and the location of the acquirer:
- If the acquirer is a supervised entity in another Member State, the assessment of its financial soundness will rely heavily on the assessment made by the acquirer supervisor, which has all the information on the profitability, liquidity, and solvency of the acquirer, as well as on the availability of the resources for the acquisition.
- If the acquirer is a financial entity supervised by a competent supervisor in a third country considered ‘equivalent’, the assessment may be facilitated by cooperation with that competent supervisor.

4th assessment criterion

Compliance with prudential requirements

DEFINITION AND SCOPE

67. This criterion is formulated in the Directive as follows:

"whether the [financial] institution will be able to comply and continue to comply with the prudential requirements based on [the prudential European] Directive[s], in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities".

68. If criterion 3 aims basically at clarifying whether the financial situation of the acquirer is sound enough to support the acquisition of the target financial institution, criterion 4 requires that the proposed acquisition does not adversely affect the target institution's compliance with prudential requirements. In particular, effective supervision, information exchange, and the clear allocation of responsibilities should not be hindered as a result of the acquisition.

69. This specific assessment of the acquirer's plan at the time of the acquisition is complementary to the responsibilities of the target supervisor for the on-going supervision of the target financial institution.

70. The competent supervisor should take into consideration not only the objective facts, such as the intended share in the institution (proportionality principle), the reputation of the acquirer, its financial soundness, and its group structure; but also the acquirer's declared intentions towards the target institution expressed in its strategy (business plan). This could be backed by appropriate commitments of the kind mentioned in recital 3 of the Directive. These commitments could concern, for example, financial support in case of liquidity or solvency problems, corporate governance issues, the acquirer's future target share in the institution, directions and goals for development, etc.

PRUDENTIAL REQUIREMENTS

71. The prudential requirements should be based on the applicable European Directives.

72. The target supervisor should take into account the ability of the target financial institution to comply at the time of the acquisition, and to continue to comply after the acquisition, with all prudential requirements, including capital requirements, liquidity requirements, large exposures limits, requirements related to governance arrangements, internal control, risk management, compliance, etc.

73. If the target institution will be part of a group, the structure of the group should make it possible to exercise effective supervision, effectively exchange information with the competent authorities, and determine the allocation of responsibilities among the competent authorities.

74. The "group structure" should cover the members of the group, including their parent entities and subsidiaries, and intra-group corporate governance rules (decision-making mechanisms, level of independence, capital management).

75. "To exercise effective supervision" means that the supervisor is not prevented from fulfilling its supervisory duties by the institution's close links to other natural or legal persons. It also means that the supervisor is not prevented from fulfilling its monitoring duties by the laws, regulations, or administrative provisions of another country governing a natural or legal person with close links to the institution, or by difficulties in the enforcement of those laws, regulations, or administrative provisions.

76. The prudential assessment of the acquirer should also cover its capacity to support adequate organisation of the target institution within its new group. Both the target financial institution and the group should have clear and transparent corporate governance arrangements and adequate organisation, including an effective internal control system and independent control functions (risk management, compliance, and internal audit).

77. The group of which the target institution will become a part should be adequately capitalised, and its own funds should be distributed appropriately within the group according to the level of risk in each part.

78. The target supervisor should also consider whether the acquirer will be able to provide the target institution with the financial support it may need for the type of business pursued by and/or envisaged for it; to provide any new capital that the target financial institution may require for future growth in its activities; or to implement any other appropriate solution to accommodate the target financial institution's needs for additional own funds.

APPLICATION OF THE PROPORTIONALITY PRINCIPLE

79. Criterion 4 is mainly relevant in cases of change in control at the time of acquisition and on a continuous basis for the foreseeable future (usually 3 years). The business plan provided by the acquirer to the target supervisor should cover at least this period. On the other hand, in cases of qualifying holding of less than 20 %, information requirements are downscaled.

80. The business plan should clarify the plans of the acquirer concerning the future activities and organisation of the target institution. This should include a description of its proposed group structure. The plan should

also evaluate the financial consequences of the proposed acquisition and include a medium-term forecast.

5th assessment criterion

Suspicion of money laundering or terrorist financing

DEFINITION AND SCOPE

81. This criterion is formulated in the Directive as follows:

"*whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof*".

82. To understand this criterion, it is necessary to refer to the methodology developed by FATF-GAFI [13] for assessing compliance with the FATF-GAFI 40 Recommendations and the FATF-GAFI 9 Special Recommendations. National legislation based on the EU-AML/CFT Directives has implemented these recommendations by establishing a consistent anti-money laundering framework throughout the EU.

83. In this context, financial institutions are required to report transactions to the Financial Intelligence Unit whenever they "*suspect or have reasonable grounds to suspect*" that the funds involved may have been or are the proceeds of criminal activity or are linked to terrorism. Transactions should be reported whenever the circumstances surrounding them would lead a reasonable person to be suspicious. These concepts should also be used for the prudential assessment of acquirers.

84. Clearly, if the proposed acquirer is suspected or known to be involved in money laundering operations or attempts, whether or not this is linked directly or indirectly to the proposed acquisition, the 'integrity' criterion should be sufficient for the target supervisor to oppose the proposed acquisition.

85. Similarly, if the proposed acquirer is 'listed' as being a terrorist, or if he is suspected or known to finance terrorism, the 'integrity' criterion' should also be sufficient to allow the competent supervisor to oppose the proposed acquisition.

86. The target supervisor can also oppose the acquisition even when there are no criminal records, or where there are no reasonable grounds to doubt the integrity of the proposed acquirer, if the context of the acquisition would increase the risk of ML/TF. This could be the case, for example, if the proposed acquirer is established in a country or territory considered by the FATF to be 'non-cooperative', or, more broadly, in a

13 Financial Action Task Force (FATF) - Groupe d'Action Financière (GAFI)

country or territory that has not taken sufficient measures to comply with the FATF-GAFI 40 and 9 recommendations.

87. In addition to information about the acquirer gathered during the assessment process, competent authorities should collect information from (for example) court decisions, public prosecutor's files, FATF-GAFI country assessments or typology reports [14], etc. The competent authorities should also collect information regarding the origin of the funds that will be used to acquire the proposed holding.

88. The ML/TF assessment complements the integrity assessment and should be carried out regardless of the value and other characteristics of the proposed acquisition.

PRACTICALITIES OF THE COOPERATION PROCESS

Owners

89. 'Reasonable grounds' play an important role in the assessment. Missing information or information regarded as incomplete, insufficient, or liable to give rise to suspicion – for example, capital movements not accounted for, cross-border relocation of headquarters, reshuffles in management or legal person owners, earlier associations of the owners, or the management of the company by criminals – should trigger increased supervisory diligence and requests for further information by the acquirer supervisor.

Funds

90. It is essential to establish that the funds used for the acquisition are channelled through chains of financial institutions all of which are subject to supervision by competent authorities in the EEA or in third countries considered to be equivalent. This requirement may filter out a number of criminal attempts to acquire positions in the financial sector.

91. Information on the history of the business activities of the acquirer and on the financing scheme should be consistent with the value of the deal. The funds must have an uninterrupted paper trail back to their origins, or other information that allows the supervisory authorities to resolve all doubts as to their legal origin.

14 Typology reports published by the FATF-GAFI offer a comprehensive overview of the most recurrent money laundering / terrorism financing typologies.

Guidance to facilitate coordination and exchange of information between supervisory authorities

I. Objectives

92. In view of the provisions of the Directive setting a maximum of 60 working days for completing the prudential assessment of the proposed acquirer, the acquirer supervisor and the target supervisor have a common interest in strengthening their cooperation to permit an effective and efficient process for assessing an acquisition or an increase in a shareholding.

93. Thus, when the acquirer is a supervised entity within the EEA, the overall aim of this guidance is to ensure that information related to the prudential supervision of the acquirer is made available in a timely manner to all interested supervisors, i.e., to each supervisory authority which may be concerned in the case of cascading holdings; these holdings are referred to in paragraph 15 above.

94. Even when the acquirer is not a regulated entity, exchanges of information may permit the target supervisor to obtain useful information from a previous assessment (to the extent permitted by the law governing the acquirer authority). However, the acquirer supervisor does not have to collect new information, in addition to information that is already available.

95. This guidance presupposes that the nature and characteristics of the information communicated among supervisors during the assessment period meets the highest international standards of prudential information (in terms of being complete, accurate, and up-to-date). The quality of information exchanged helps to build trust among supervisors and confidence in their respective assessment processes.

96. This guidance does not set out the list the documents which should be exchanged between the supervisory authorities concerned. Rather, it is intended to establish when and how the process of communication of information should work in both directions.

97. Clearly defining the respective roles of the acquirer supervisor and the target supervisor, and establishing precisely when information is to be communicated, helps in coordinating the collection and exchange of information and avoids placing an undue burden on any one supervisory authority. It also assists in the planning of supervisory tasks under the umbrella of the target supervisor. Indeed, the target supervisor may find it necessary to ask the supervisors of the direct or indirect proposed acquirer for information that they are in the best position to provide

(such as previous assessments of the suitability and financial soundness of the acquirer).

98. The competent authorities shall provide each other, without undue delay, with any information that appears to be essential or relevant to the assessment. They should communicate relevant information upon request, but they should communicate essential information on their own initiative as soon as the target supervisor has informed the acquirer supervisor of a proposed acquisition. Essential information, in this context, means any information that could materially influence the assessment, such as group structure, the most recent assessments of the acquirer's financial soundness, etc.)

99. European supervisory authorities may exchange certain pieces of information with competent authorities located in third countries that exercise equivalent supervision, provided that they comply with international standards and rules governing confidentiality. Each competent authority is competent to determine which third-country shall be considered equivalent.

II. Practical features of the framework

100. Supervisory authorities should open a preliminary dialogue with each other as soon as evidence of a serious proposal for an acquisition or for an increase in shareholding occurs, or when a constructive dialogue has begun between the proposed acquirer and the target supervisor.

101. In most cases, formal exchanges of information will begin immediately after the notification by the proposed acquirer. The communication process should be initiated and developed by the target supervisor, who will transmit formal requests to the other supervisory authorities concerned.

102. The Secretariats of each of the three Level 3 Committees (CEBS, CESR, and CEIOPS) will maintain a current list of European supervisory authorities, including contact information (postal and e-mail addresses) for the liaison persons responsible for forwarding requests received from other supervisory authorities to the appropriate staff members within their organisations. This list will be available on the Committees' websites.

103. In cases where several authorities in one Member State are involved in the same project, it will be up to those authorities to coordinate among themselves in order to indicate the authority that will arrange the exchanges of information between the authorities in its territory and the target supervisor.

III. Practicalities of cooperation

104. Supervisory authorities are encouraged to use secure Internet websites and/or e-mail addresses to exchange information – even if this may require scanning certain documents – in order to limit the amount of time required to transmit documents to the target supervisor (a limit of approximately ten working days may be considered appropriate for the first exchange of information), and to reduce the risk of documents being lost, stolen or delayed, or their confidentiality breached while in transit.

105. Each supervisory authority shall ensure that only a limited number of designated persons bound by confidentiality shall receive information and requests for information, in order to ensure that the exchange of information remains secure, given the major financial and legal stakes involved.

106. The contents of the initial communications between all authorities should have a standardised format, to facilitate a clear grasp of the scope of the request, while providing for direct access for contact with the appropriate persons at the authorities concerned.

A/ Initiation of cooperation

107. As soon as possible after receiving a notification from a proposed acquirer that is a financial institution supervised by another EEA supervisor, the target supervisor should inform the acquirer supervisor of the notification.

108. This first communication should normally contain of the following information, stated clearly, concisely, and simply:

a. the identity of the proposed acquirer(s), supported by relevant information (address of the head office, contact persons, etc.);

b. the identity of the target financial institution;

c. a succinct description of the proposed transaction, including:
   i. the size of the intended holding (change in control or qualifying holding);
   ii. information on the current stage in the planned acquisition process;

d. the identities of the staff members at the target supervisor who are in charge of exchanges of information concerning the proposed acquisition [15]; and

e. a list of other supervisors that could be involved in the assessment process.

15 Information to be exchanged may include:
- the names and telephone numbers of the staff members of the target supervisor;
- the postal address for all exchanges of information;
- the e-mail address for all exchanges of information; and
- an indication of the practical details for the exchanges of information, including the presumed deadline, the means to be used, etc.

109. This information can be adapted, if necessary, on a case-by-case basis based on the specifics of the acquisition to be assessed.

110. The Secretariats of the three Committees will provide a model template [16] that should be used by authorities for transmitting their request for information.

B/ Cooperation and exchange of information

111. As soon as possible after receiving a formal notification from the acquirer, the target supervisor should analyze the information accompanying the notification to determine the potential need for cooperation with other supervisors and the subject matter for such cooperation. The target supervisor should then re-contact the acquirer supervisor(s) promptly and state as precisely as possible the elements of the case requiring further exchange of information and cooperation among supervisors.

112. The information exchanged between supervisors could include:

1) the shareholding structure of the acquirer and the main characteristics of its shareholders;
2) the most recent assessment of the suitability (fitness and propriety) of the acquirer, along with copies of the relevant and appropriate documents on which the assessment is based, if required by the target supervisor, and to the extent permitted by the law of the acquirer supervisor;
3) the most recent assessment of the acquirer's financial soundness, with related public or external audit reports if possible; and
4) the most recent assessment by the acquirer supervisor of the quality of the management structure of the acquirer and its administrative and accounting procedures, internal control systems, corporate governance, group structure, etc.

113. If the proposal submitted by the acquirer indicates changes in staffing at the supervised entity, the target supervisor shall mention this fact to the acquirer supervisor. The target supervisor may need to request the cooperation of other supervisory authorities (including the acquirer supervisor) to gather information and to be able to assess the fitness and propriety of persons to be appointed to direct the business.

114. The acquirer supervisor should inform the target supervisor on its own initiative of any views that could or should be taken into account in the assessment process, or of any reservations that the acquirer supervisor has regarding the acquirer's project. Such a situation may occur, for instance, when an acquirer is financially sound and has an appropriate organisation but is too small to support the acquisition of a large institution.

16 Both the information set described in paragraph 108 and the template to be developed by the three Secretariats will be revised at a later stage in the light of experience acquired by the supervisory authorities.

C/ Supplementary comments and modalities

115. Recital 7 of the Directive states that: "*Regular contact between the proposed acquirer and the competent authority of the regulated entity in which the acquisition is proposed may also commence in anticipation of a formal notification. Such cooperation should imply a genuine effort to assist each other in order, for example, to avoid unanticipated requests for information or the submission of information late in the assessment period".*

116. When an acquirer supervisor is informed unofficially by a financial institution which it supervises that the institution intends to acquire or increase a qualifying holding in a target financial institution located in another Member State, the acquirer supervisor should explicitly draw the attention of the proposed acquirer to the applicable provisions concerning the prudential assessment of the proposed acquisition. If the plans of the proposed acquirer appear to be sufficiently well advanced, the acquirer supervisor should also advise it to make contact as soon as possible with the target supervisor – even informally at an initial stage – with the objective of preparing and launching the assessment process in the best conditions.

117. In such cases, or when the target supervisor has been informed unofficially by the proposed acquirer about a possible acquisition, any formal exchange of information between competent authorities that occurs at such an early stage should fully respect the highest degree of confidentiality that is generally requested in such transactions.

- Appendix I -

Glossary

- ***ACTING IN CONCERT***

  In the particular context of Directive 2007/44/EC, persons are '*acting in concert'* when each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made between them. Notification of the voting rights held collectively by these persons will have to be made to the competent authorities by each of the parties concerned or by one of these parties on behalf of the group of persons acting in concert.

- ***BENEFICIAL OWNERS***

  '*Beneficial owners*' are [17] the natural persons who ultimately own or control the acquirer, and/or the persons on whose behalf the acquisition is being conducted. It also includes persons who exercise ultimate effective control over an acquirer which is a legal person or a legal arrangement, such as a trust.

- ***CONTROL***

  The notion of 'control' of the target financial institution shall be understood as defined in the sectoral directives, i.e. "*the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC* [18]*, or a similar relationship between any natural or legal person and an undertaking*".

---

17 Consistently with Directive 2005/60/CE of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

18 Article 1 of the Directive *83/349/EEC* states that:

"1. A Member State shall require any undertaking governed by its national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking):

(a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or

(b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; or

(c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent undertaking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision; or

(d) is a shareholder in or member of an undertaking, and:

(aa) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated accounts are drawn up, have been appointed solely as a result of the exercise of its voting rights; or

(bb) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. The Member States may introduce more detailed provisions concerning the form and contents of such agreements.

The Member States shall prescribe at least the arrangements referred to in (bb) above.

They may make the application of (aa) above dependent upon the holding's representing 20 % or more of the shareholders' or members' voting rights.

However, (aa) above shall not apply where another undertaking has the rights referred to in subparagraphs (a), (b) or (c) above with regard to that subsidiary undertaking.

- ***CROSSING A THRESHOLD INVOLUNTARILY***

  Shareholders may cross a threshold '*involuntarily'* as a result of the repurchase by the financial institution of shares held by other shareholders, or in the event of an increase in capital in which existing shareholders do not participate. In such cases they must notify the competent authorities immediately they become aware of such crossing of a threshold, even if they intend to reduce their level of shareholding so that it once again falls below the threshold level.

- ***NATURAL PERSON***

  'Natural person' is understood to include both natural persons in the strict sense of the term and transparent legal entities whose associates bear personal liability for the legal entity.

- ***QUALIFYING HOLDING***

  '*Qualifying holding'*, as defined in Directives 2002/83/EC, 2004/39/EC, 2005/68/EC, and 2006/48/EC, means a direct or indirect (via one or several controlled undertakings) holding in an undertaking which represents 10% or more of the capital or the voting rights of an undertaking or which makes it possible to exercise a significant influence over the management of the undertaking. In the case of '*indirect qualifying holders'*, such as cascading holdings that span different Member States, the immediate acquiring institution must notify each of the jurisdictions, while (as stipulated in the Directive) the responsibility for the final decision regarding the prudential assessment remains with the competent supervisor of the entity in which the acquisition is proposed.

- ***SIGNIFICANT INFLUENCE***

  A proposed acquirer is considered to exercise a '*significant influence'* when its shareholding, although below the 10% threshold, allows it to exercise a significant influence over the management of the institution (for example, allows it to have a representative on the board of directors).

  Holdings are subject to the full notification requirements if the Member State concerned demonstrates, on a case-by-case basis, that the ownership structure of the target financial institution and the concrete involvement of the acquirer in its management create a significant influence even at this low level.

---

2. Apart from the cases mentioned in paragraph 1 above and pending subsequent coordination, the Member States may require any undertaking governed by their national law to draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking) holds a participating interest as defined in Article 17 of Directive 78/660/EEC in another undertaking (a subsidiary undertaking), and:

(a) it actually exercises a dominant influence over it; or

(b) it and the subsidiary undertaking are managed on a unified basis by the parent undertaking."

- ***SUPERVISOR***
  - ✓ ***ACQUIRER SUPERVISOR***

    The 'acquirer supervisor' is the competent authority responsible for the supervision of an acquirer which is a supervised financial institution.
  - ✓ ***TARGET SUPERVISOR***

    The 'target supervisor' is the competent authority responsible for the supervision of the target financial institution.
- ***THIRD COUNTRIES CONSIDERED AS EQUIVALENT***

  For matters concerning the fight against money laundering and counter-terrorism financing (criterion 5), '*third countries considered as equivalent'* are those countries that are determined by the special Committee on the Prevention of Money Laundering and Terrorist Financing (CPMLTF) to have a standard for the prevention of money laundering and terrorist financing that is comparable to the EU standard.

  For matters concerning prudential requirements (criteria 1 through 4), '*third countries considered as equivalent'* are those countries outside the EEA in which regulated financial institutions are subject to a supervisory regime that is determined by the competent authority of a Member State to be equivalent to the supervision required by the sectoral EU Directives.

  Even if the supervision carried out by the third country authority is considered as '*equivalent'*, the arrangements for supervisory exchanges of information with that authority will be considered adequate only if it has agreed to establish a Memorandum of Understanding for mutual cooperation with the respective European competent authority, and no laws, regulations, or administrative provisions in the third country prevent the exchange of information.

- Appendix II -
List of information required for the assessment of an acquisition

Principles:

1. This appendix is divided into two sections. The first section lists 'general information requirements': all of the information which will normally be requested [19] by the target supervisor concerning the nature of the proposed acquirer and the proposed acquisition, regardless of the presumed degree of involvement (percentage of capital or voting rights) that the acquirer will have in the target financial institution.

2. The second section lists the specific information required on the basis of the proportionality principle [17], distinguishing between two cases: when the acquisition will result in a change in control over the financial institution, and when acquirer will not gain control over the target financial institution but will acquire a qualifying holding.

3. Case 1- Change in control: The notion of 'control' of a target financial institution is defined in the Glossary, with reference to the sectoral Directives.

4. In case of a change in control, the proposed acquirer shall provide a business plan to the target supervisor.

5. Case 2 - Acquisition of a qualifying shareholding: When the acquirer will not gain control over the target financial institution but will acquire a qualifying holding, the information required should be proportionate to the presumed degree of involvement of the acquirer in the management of the target financial institution.

6. In all cases, the proposed acquirer should attest to the target supervisor that all of the information communicated by him is accurate, and is not false, misleading, or deceptive. The target supervisor should be able to verify the statement submitted by the proposed acquirer by asking it to provide documents evidencing that the statement is true (e.g., recent extracts from the criminal register) and, if needed, by requesting confirmation from other authorities (e.g. judicial authorities or other regulators), domestic or otherwise.

7. The information requirements listed in this appendix have to be provided by the persons (whether direct or indirect proposed acquirers) subject to notification requirements according to paragraph 13.

---

19 This list is intended to be exhaustive (unless there is a need for additional information according to para 9, e.g. for information that constitutes a continuation or clarification) specifying all of the information that the acquirer must provide to the target supervisor for the purpose of assessing the proposed acquisition. However, the target supervisor may exempt the acquirer from providing some of the listed information if this information does not seem to be necessary for the sound assessment of the acquirer in the specific case. This is the case, for example, if the target authority already holds the information or if the information could easily be obtained from another authority or the acquisition concerns an intra-group transaction.

Part I - General information requirements

1. IDENTITY OF THE PROPOSED ACQUIRER

a- In the case of a natural person:

(1) Name, date, place of birth, address;

(2) A complete curriculum vitae, detailing relevant education and training, previous professional experience, and activities or additional functions currently performed;

b- In the case of a legal person:

(3) Business and registered name and address of head office, supported by probative evidence;

(4) Registration of legal form in accordance with national legislation;

(5) Up to date overview of entrepreneurial activities;

(6) Complete list of persons who effectively direct the business and curriculum vitae, detailing their previous professional experience and activities currently performed;

(7) Identity of all other persons who are 'beneficial owners' of the legal person.

c- In the case of a trust that already exists or would result from the acquisition:

(8) Identity of all persons who will manage assets (trustees) under the terms of the trust document and their respective shares in the distribution of income.

(9) Identity of all other persons who are 'beneficial owners' of the trust property.

2. ADDITIONAL INFORMATION ON THE ACQUIRER

a- In the case of a natural person:

(10) Concerning the acquirer *and any company ever directed or controlled* by the acquirer, information on any:

(a) relevant criminal record*s, or criminal investigations or proce*edings, relevant civil and administrative cases, and disciplinary actions (including disqualification as a company director or bankruptcy, insolvency or similar procedures);

(b) investigations, enforcement proceedings, or sanctions by a supervisory authority which the person has been the subject of;

(c) refusal of registration, authorisation, membership or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation, membership or licence; or expulsion by a regulatory or government body;

(d) dismissal from employment or a position of trust, fiduciary relationship, or similar situation, or having been asked to resign from employment in such a position;

(11) Information as to whether an assessment of reputation as an acquirer or as a person who directs the business of a financial institution has already been conducted by another supervisory authority (the identity of that authority and evidence of the outcome of this assessment);

(12) Information as to whether a previous assessment by another authority from another, non-financial, sector has already been conducted (the identity of that authority and evidence of the outcome of this assessment);

(13) Information by the acquirer regarding his financial position and strength: details concerning his sources of revenues, assets and liabilities, pledges and guarantees, etc;

(14) Description of the professional activities of the acquirer;

(15) Financial information including ratings and public reports on the companies controlled or directed by the acquirer and if available, ratings and public reports on the acquirer himself;

(16) Description of the financial [20] and non-financial [21] interests or relationships of the acquirer with:

(a) any other current shareholders of the target institution;

(b) any person entitled to exercise voting rights of the target institution [22];

(c) any member of the board or similar body, or of the senior management of the target institution;

(d) the target financial institution itself and its group;

(e) any other interests or activities of the acquirer that may be in conflict with the target financial institution and possible solutions to those conflicts of interest.

b- <u>In the case of a legal person:</u>

(17) Concerning the acquirer, any person who effectively directs its business and any company under its control, information on any:

(a) relevant criminal records, criminal investigations or proceedings, relevant civil and administrative cases, or disciplinary actions (including disqualification as company director or bankruptcy, insolvency or similar procedures);

(b) investigations, enforcement proceedings, or sanctions by a supervisory authority which the person has been the subject of;

(c) refusal of registration, authorisation, membership, or licence to carry out a trade, business or profession; or the withdrawal, revocation or termination of registration, authorisation,

20 Financial interests include for example credit operations, guarantees, pledges.

21 Non-financial interests include for example familial relationships.

22 See the situations mentioned in Article 10 of Directive 2004/109/EC on the harmonization of transparency requirements.

membership or licence; or expulsion by a regulatory or government body;

(18) Information as to whether an assessment of reputation, as an acquirer or as a person who direct the business of a financial institution, has already been conducted by another supervisory authority (the identity of that authority and evidence of the outcome of this assessment);

(19) Information as to whether a previous assessment by another authority from another sector has already been conducted (the identity of that authority and evidence of the outcome of this assessment);

(20) Description of the financial [23] and non-financial [24] interests or relationships of the acquirer with:

(a) any other current shareholders of the target institution;

(b) any person entitled to exercise voting rights of the target institution [25];

(c) any member of the board or similar body, or of the senior management of the target institution;

(d) the target financial institution itself and its group;

(e) any other interests or activities of the acquirer that may be in conflict with the target financial institution and possible solutions to those conflicts of interest;

(21) The shareholding structure of the acquirer, with the identity of all shareholders with significant influence and their respective percentages of capital and voting rights and information on shareholders agreements;

(22) If the acquirer is part of a group (as a subsidiary or as the parent company), a detailed organisational chart of the entire corporate structure and information on the percentages (capital stock and voting rights) of relevant shareholders and on the activities currently performed by the group;

(23) Identification of supervised institution(s) within the group, and the names of their home state regulators;

(24) Statutory financial statements, regardless of the size of the firm, for the last three financial periods, approved, if possible, by an auditing firm, including:

(a) Balance Sheet,

(b) Profit and Loss accounts/Income Statements,

(c) Annual Reports and financial annexes and all other documents registered with the Commercial Court;

(25) Information about the credit rating of the acquirer and the overall rating of its group.

---

23 Financial interests include for example credit operations, guarantees, pledges.

24 e.g. same shareholders, same managers, etc.

25 See the situations mentioned in Article 10 of Directive 2004/109/EC on the harmonisation of transparency requirements.

3- INFORMATION ON THE ACQUISITION

(26) Identification of the target financial institution;

(27) The overall aim of the acquisition (e.g. strategic investment, portfolio investment, etc.);

(28) The number and type of shares (ordinary shares or any other kind) of the target financial institution owned by the acquirer before and after the operation; the amount of the shares in the total capital, in percentage, in Euros, and in local currency; and the proportion of voting rights, if different from the proportion of capital;

(29) Any action in concert with other parties (contribution of other parties to the financing, means of participation in the financial arrangements, future organisational arrangements, etc.);

(30) Provisions of (contemplated) shareholder's agreements with other shareholders in relation to the target financial institution;

4- INFORMATION ON THE FINANCING OF THE ACQUISITION

(31) Details on the use of private financial resources and their origin: convincing evidence or a signed statement;

(32) Information on the means and the network used to transfer funds (availability of the resources which will be used for the acquisition, financial arrangements, etc.);

(33) Details on access to capital sources and financial markets and on the funding for the purchase of the shares;

(34) Information on the use of borrowed funds contracted with the banking system (financial instruments to be issued) or any kind of financial relationship with other shareholders of the institution (maturities, terms, pledges and guarantees);

(35) Information on assets of the acquirer or the target financial institution which are to be sold in the short term (conditions of sale, price appraisal, and details on their characteristics).

Part II – Additional information requirements linked to the level of the shareholding to be acquired

A: CHANGE IN CONTROL

If there is a 'change in control' in the target financial institution, **a business plan** [26] should be provided, containing information on the contemplated strategic development plan relating to the acquisition, prospective data, and details on principal modifications or changes in the target institution envisaged by the proposed acquirer:

I. A strategic development plan indicating, in general terms, the main goals of the acquisition and the main ways for reaching them, including:
   (a) the rationale for the acquisition,
   (b) medium-term financial goals (return on equity, cost-benefit ratio, earnings per share, etc.),
   (c) the main synergies to be pursued within the target financial institution,
   (d) the possible redirection of activities/products/targeted customers and the possible reallocation of funds/resources anticipated within the target institution;
   (e) general modalities for including and integrating the target institution in the group structure of the acquirer[27], including a description of the main synergies to be pursued with other companies in the group as well as a description of the policies governing intra-group relations.

II. Estimated financial statements of the target financial institution, on both a solo and consolidated basis, for a period of 3 years, including:
   (a) a forecast balance sheet and profit and loss account;
   (b) forecast of prudential ratios;
   (c) information on the level of risk exposures (credit, market, operational, etc.); and
   (d) a forecast of provisional intra-group operations.

III. The impact of the acquisition on the corporate governance and general organisational structure of the target institution, including the impact on:
   (a) the composition[28] and duties of the board and the main committees created by the decision-taking body (the management committee, risk committee, audit committee, and any other committees);
   (b) administrative and accounting procedures and internal controls: principal changes in procedures and systems related to accounting,

26 Under some circumstances, like in the case of acquisitions by means of a public offer, the acquirer may encounter difficulties in obtaining information which is needed to establish a full business plan. In this case, the acquirer shall indicate these difficulties to the target authority and point out the aspects of his business plan that might be modified in the near term.

27 For institutions supervised in the EEA, information about the group structure of the acquirer could be reduced to information about parts of its group structure which are affected by the transaction (for example Retail Department of the acquirer for the acquisition of an entity whose activities are only retail ones).

28 Including information concerning the persons who will be appointed to direct the business.

audit, internal control, and compliance (including anti-money laundering) including the appointment of key functions (auditor/internal controller and compliance officer);

(c) the overall IT systems architecture : this includes, for example, any changes concerning the sub-contracting policy, the data flowchart, the in-house and external software used and the essential data and systems security procedures and tools (e.g. back-up, continuity plan, audit trails, etc); and

(d) the policies governing subcontracting and outsourcing (areas concerned, selection of service providers, etc.) and the respective rights and obligations of the principal parties as set out in contracts (e.g., audit arrangements, quality of service expected from the provider, etc.).

B: QUALIFYING SHAREHOLDING WITHOUT A CHANGE IN CONTROL

If there is no change in control, the proposed acquirer should provide a document on strategy to the target supervisor. Applying the proportionality principle, the level of information provided should depend on the degree of influence on the management and activities of the target institution inherent in the holding to be acquired (less than 20% vs. between 20% and 50%)

Depending on the global structure of the shareholding of the target institution, the more detailed information set out under point b) below could be requested by the target supervisor even in cases where the shareholding to be acquired remains below the threshold of 20%, if the 'influence' exercised by that shareholding is considered to be equivalent to the influence exercised by shareholdings considered under point b).

a) Qualifying holding of less than 20 %:

The '*document on strategy'* should contain the following information:

I. The policy of the acquirer regarding the acquisition. In addition to the information required in Part I, Point 3 of this list, the proposed acquirer is required to inform the competent supervisor about :

(a) the period for which the proposed acquirer intends to hold his shareholding after the acquisition;

(b) any intention of the acquirer to increase, reduce, or maintain the level of his shareholding in the foreseeable future;

II. An indication of the intentions of the acquirer towards the target institution, and in particular whether or not he intends to act as an active minority shareholder, and the rationale for such action;

III. Information on the ability (financial position) and willingness of the proposed acquirer to support the target institution with additional own funds if needed for the development of its activities or in case of financial difficulties.

b) Qualifying holding between 20 and 50 %:

Information of the same nature as mentioned under point a) above shall be provided, but in more detail, including:

I. Details on the influence that the acquirer intends to exercise on the financial position (including dividend policy), the strategic development, and the allocation of resources of the target institution.

II. A description of the acquirer's intentions and expectations towards the target institution in the medium-term, covering all the elements mentioned above under part I of the business plan.
